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No. 76-1671

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DEMARCO, JR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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EVENTS INTERVENING BETWEEN THE FILING OF THE ORIGINAL INDICTMENT AND THE FILING OF THE LOS ANGELES INDICTMENT JUSTIFIED THE BRINGING OF THE ADDITIONAL CHARGE.

The Petition for Writ of Certiorari asks this Court to find that its decision in *Blackledge* v. *Perry*, 417 U.S. 21, the progeny of its earlier decision in *North Carolina* v. *Pearce*, 395 U.S. 711, was interpreted erroneously by the lower courts. The Government urges that, on two grounds, the rule of *Blackledge* is inapplicable here. First, *Blackledge* proscribed the bringing of the more serious charge only where the facts were initially amenable to charges of varying degrees of severity and the prosecutor had opted for the less severe alternative. Obviously, nothing of the sort happened here. Second, *Blackledge* proscribed the bringing of the more serious charge only where there

had occurred no intervening event which would justify the restructuring of the prosecution. In this case, the change of venue removed the legitimate reason for not having brought a contemporaneous indictment in the Central District of California, and warranted reconsideration of the prosecutor's options.

The Brief in Opposition deals principally with this latter distinction. DeMarco agrees that, "where an event occurs between the first and second indictment which on its face negatives the appearance of retaliation . . . a charge increase [will] be condoned" (Brief in Opposition, p. 11), but urges that there was no such event. This Reply Brief focuses on that point.

Prior to the transfer of the District of Columbia charges, there was no way in which the Government could have resolved all possible criminal charges against DeMarco in one case. Given its view that venue as to both DeMarco and his co-defendant Newman existed in the District of Columbia, the Government opted for the sensible and rational course of attempting to resolve all criminal charges arising out of the Nixon tax returns in one prosecution. Even if the case had not raised issues of national interest, this alternative would have been the wise one. Given the historical context of the charges, the decision not to bifurcate the prosecution was correct beyond question.

It is therefore clear that the original decision to proceed only in the District of Columbia was based not on any infirmity in the California charge but, rather, on the judgment that one criminal proceeding was enough. DeMarco agrees that there was no statutory or constitutional barrier to the institution of a parallel proceeding in the Central District of California (Brief in Opposition, pp. 12-13). The absence of a barrier to prosecution,

however, does not, in an enlightened system of law enforcement, require the bringing of the charge. It merely triggers consideration of whether, under all the circumstances, the charge should be brought. In this case, for reasons which are defective only in the hindsight of the lower court opinions, the Government decided not to subject itself and DeMarco to multiple and costly litigation, a judgment which it would seem the courts should approve rather than discourage.

DeMarco strenuously urges that there was no equitable restraint which blocked the bringing of the charge in the Central District of California. He offers no alternate reason why the Government should have refrained from doing so but suggests that, had such a charge been brought contemporaneously with the District of Columbia indictment, it might have been the basis for a successful motion by DeMarco to consolidate the charges in Los Angeles (Brief in Opposition, p. 15, n. 6). This argument is without support in the record and flies in the face of the undisputed proposition that no one District Court has the power to order trans-district consolidation. *United States* v. *Sklaroff*, 323 F. Supp. 296, 324 (S.D. Fla.). It would have had no effect whatever on the transferability of the District of Columbia charges had there been a Central District of California charge pending.[1]

DeMarco challenges the Government's claim that equitable restraint prevented it from bringing the Central District of California charge by arguing that, after Judge

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[1]Transferability of the District of Columbia charges under 18 U.S.C. § 3237(b) would not have been made more or less likely by the pendency of the Central District of California charges. Convenience considerations would have dictated one trial in the District of Columbia against both Newman and DeMarco.

Gasch ordered the cases against Newman and DeMarco transferred to their respective districts of residence, the principal concern expressed by the Government was that there be a joint trial. This argument overlooks the critical fact that several months had passed between the time when the Government was faced with the decision whether to bring a parallel proceeding (February, 1975) and the time when the Government was faced with the likelihood of separate trials (April, 1975). At the later date, in light of Judge Gasch's adverse decision, the Government was willing to abandon its right to seek the California indictment; however, it does not follow, as Respondent would have it, that the Government's initial exercise of restraint was based on other than purely equitable grounds. All that follows is that, faced with an inevitable serverance if Judge Gasch's ruling were sustained, the Government was prepared to waive its right to bring additional charges and its right to appeal if it could preserve a joint trial. In no way does this later stance derogate from the conclusion that equitable considerations alone initially prevented the California prosecution.

It is apparent, therefore, that the circumstances intervening between the time when the California charge could have been brought and the time when it actually was brought justified the restructuring of the prosecution and completely negatived either the possibility or the appearance of retaliation. *Blackledge* is simply inapposite to this case.[2]

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[2]In addition to the cases cited at page 14 of its Petition, which demonstrate the inapplicability of *Blackledge* to situations in which there have occurred legitimate changes in circumstances, the Government would direct the Court's attention to *United States* v. *Cahn*, No. 76-1328 (C.A. 2), *certiorari denied*, 45 U.S.L.W. 3634 (March 22, 1977). In that case, after a mistrial, in order to counter the defendant's testimony, the Government superceded the original seven-count indictment with one of forty-six counts. Govt. Brief

Since the filing of the Petition, the Court has granted certiorari in *Hayes* v. *Cowan*, 547 F. 2d 42 (C.A. 6), *certiorari granted sub nom. Bordenkircher* v. *Hayes*, 45 U.S.L.W. 3785 (June 6, 1977). *Hayes* is distinguishable from this case because, as respondent points out, it involves a claim of retailiatory prosecution in the special context of plea bargaining, but is, at the same time, closer to the facts of *Blackledge*, for it appears that no event intervened between the filing of the original charge and the filing of the more severe charge other than the defendant's insistence on his right to trial. In any event, review of the *Hayes* decision will require reexamination of the boundaries of *Blackledge*, and in order to bring some degree of uniformity to the decisions of the lower courts, some of which have applied the *Blackledge* holding to cases arising in far different factual settings,[3] it is appropriate that the Court grant this petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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on Appeal, pp. 5-6. The Court of Appeals held that *Blackledge* was inapplicable because there was an explanation for the more severe charges other than retaliation.

[3]See, e.g., *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (C.A. 9); and *United States* v. *Jamison*, 505 F. 2d 407 (C.A.D.C.).